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CITATIONS

Cases:

Kinsella v. *Krueger*, 354 U. S. 1 ..... 4, 8

Reid v. *Covert*, 354 U. S. 1 ..... 4, 5, 7, 8

Statutes:

Uniform Code of Military Justice, 64 Stat. 108, *et seq.*, as codified, 70A Stat. 36, 10 U. S. C. (Supp. V) 801, *et seq.*:

Article 2 (1) 6

Article 2 (11) 2, 4, 5, 6, 8

Article 119 3

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. ——

NINA KINSELLA, WARDEN, APPELLANT

v.

UNITED STATES EX REL. ALBERTA SINGLETON

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the District Court granting the writ of habeas corpus is not yet reported. A copy is set forth in the Appendix, *infra*, pp. 10–13.

JURISDICTION

On September 8, 1958, the District Court for the Southern District of West Virginia entered an order granting a writ of habeas corpus and ordering the discharge of Mrs. Joanna S. Dial (in whose behalf the writ was sought) from the custody of respondent (appellant here). Appendix, *infra*, p. 14. A notice of appeal to this Court was filed in the District Court

and *Krueger* cases was limited to capital cases, this case assumes an added importance and contains an added factor. One of the considerations which caused at least some of the members of the majority of the Court in *Covert* to decide as they did was that, if necessary, the perpetrators of capital offenses could be tried in some manner other than by courts-martial overseas. Because of the paucity of capital cases, Mr. Justice Frankfurter felt that it was a "manageable problem" (354 U. S. at p. 48). In his concurring opinion, Mr. Justice Harlan made the same observation (354 U. S. at p. 78): "The number of such cases would appear to be so negligible that the practical problems of affording the defendant a civilian trial would not present insuperable problems." Obviously, practical problems of much greater magnitude would be involved if provision would have to be made, perhaps by trial in this country, for every offense committed by the thousands of military dependents overseas. See, *e. g.*, footnote 12, 354 U. S. at 76, of Mr. Justice Harlan's concurring opinion in *Covert*. This factor not only distinguishes the instant case from that decided in *Covert*; it also serves to illustrate the magnitude and thus the importance of the issue now presented to the Court.

4. We shall not in this jurisdictional statement spell out the reasons, including the historical background and the practical problems involved, why we believe that Article 2 (11) is valid as applied to non-capital offenses by dependents. The Government's various briefs in the *Covert* and *Krueger* cases cover that ground. At the least, the arguments in support of the

statute's constitutionality show that the question raised here is a substantial one. In particular, for those who believe that the problem can only be solved by a weighing of the various interests—as do some of the Justices who participated in the majority decision in *Covert*—there are many factors still to be balanced.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should note jurisdiction of this appeal.[1]

J. LEE RANKIN,
Solicitor General.
W. WILSON WHITE,
Assistant Attorney General.
HAROLD H. GREENE,
WILLIAM A. KEHOE, JR.,
Attorneys.

DECEMBER 1958.

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[1] There is being filed simultaneously herewith, in the case of *McElroy* v. *United States ex rel. Guagliardo*, a petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. That case involves the question of whether a person employed by the armed forces overseas is constitutionally amenable to trial by court-martial for the commission of a non-capital offense in violation of the Uniform Code of Military Justice.

APPENDIX

Habeas Corpus No. 2145

UNITED STATES OF AMERICA, ON THE RELATION OF ALBERTA SINGLETON, PETITIONER

v.

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA

Paul M. Friedberg, Charleston, West Virginia, for relator.

Duncan W. Daugherty, United States Attorney, Huntington, West Virginia, Percy H. Brown, Assistant United States Attorney, Hinton, West Virginia, Lt. Col. Peter S. Wondolowski, Judge Advocate General's Corps, United States Army, for respondent.

MOORE, *Chief Judge.*

Opinion

More than a year ago, the Supreme Court of the United States, on a rehearing, decided in the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger,* 354 U. S. 1, 77 Sup. Ct. 1222 (1957), that civilian dependents of members of the armed forces overseas in time of peace could not be tried by court-martial for capital offenses. Since that time, considering itself bound by that decision, this court granted a writ of habeas corpus in a case involving a trial by court-martial of such a civilian dependent for the unpremeditated murder of her husband, a non-capital offense. *United States ex rel. Smith* v. *Kinsella* (D. C. S. D. W. Va. No. 1963, unreported). Now petitioner asks the court to grant a writ of habeas corpus to free one

Joanna S. Dial, convicted by court-martial of the non-capital offense of involuntary manslaughter of her one-year old son. She was a civilian dependent of her husband, a member of the armed forces overseas. The offense was committed in Germany.

Counsel for respondent stated at the hearing that the case of *Smith* v. *Kinsella, supra,* was not appealed because of a decision by army authorities that the distinction between it and the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger* was not plain enough on which to seek clarification of the last mentioned decision. He, however, argues that this court should not grant the writ in this case for the following reasons:

(1) Only four of the Justices of the Supreme Court who participated in the decision in *Reid* v. *Covert* and *Kinsella* v. *Krueger* held that *no* offense committed by civilian dependents of members of the armed forces overseas in time of peace may be tried by court-martial, whereas two of the other Justices limited their decision in this respect to capital offenses.

(2) That since the Supreme Court decision and since the decision of this court in the case of *Smith* v. *Kinsella, supra,* two district courts, in cases involving civilians employed by the armed forces overseas, who were charged with and convicted of offenses less than capital offenses, have distinguished these cases and have discharged the writs. *United States ex rel. Guagliardo* v. *McElroy,* 158 F. Supp. 171 (D. C. Dist. of Col. 1958); *Grisham* v. *Taylor,* 161 F. Supp. 112 (M. D. Pa. 1958). These two cases are said to be pending upon appeal in their respective circuits.

(3) That the United States Court of Military Appeals, in the very case now under consideration, decided on August 26, 1958, that the court-martial had

constitutional power to try Joanna S. Dial as a civilian dependent accompanying the army in West Germany.

It is, of course, known that the opinion of this court prior to the decision of the Supreme Court in the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger* was that Congress had power under Article 1, Section 8 of the Constitution of the United States to include civilian dependents accompanying the armed forces overseas as subjects of the Uniform Code of Military Justice, and therefore properly triable by court-martial for infractions of that Code. In fact, one of these cases, *Kinsella* v. *Krueger* was appealed from a decision of this court.

In the majority opinion of Mr. Justice Black reversing the case from this court and affirming the case of *Reid* v. *Covert,* he began by saying, "These cases * * * involve the power of Congress to expose civilians to trial by military tribunals, under military regulations and procedures, for offenses against the United States * * *"

Had I regarded the offense committed by Mrs. Dorothy Krueger Smith as an offense against the United States (outside the Uniform Code of Military Justice) I would have been inclined to award her the writ here. However, it was and is my opinion that the only basis for defining murder by a civilian in Japan, Germany, or any other foreign sovereignty as a crime against the United States is that it is made so by the Uniform Code of Military Justice. If this be correct, then obviously, unless the inclusion of such civilian dependents as subjects of the Uniform Code of Military Justice be a constitutional exercise of Congressional power, such a crime committed in a foreign country is not a crime against the United States, but

a crime against the foreign country where it may be committed.

However, the concurrence of six Justices of the Supreme Court in the affirmance of *Reid* v. *Covert* and the reversal of the companion case of *Krueger* v. *Kinsella,* (styled *Kinsella* v. *Krueger* in the Supreme Court), indicates to me that these Justices all regarded crimes such as those I have mentioned as crimes against the United States. I can conceive of no other reason why they would have concluded that the persons accused in those cases had the constitutional right to be tried in the civil courts of the United States. I believe that I am bound by that decision, much as I may disagree with it.

Moreover, I can think of no logical distinction, insofar as the constitutional power of Congress is concerned, between its asserted power, denied by the Supreme Court, to subject dependents of members of the armed forces overseas to the jurisdiction of courts-martial for capital offenses, and the like questioned power in cases of non-capital offenses. Of course, where matters of life or death are involved, the facts must be scrutinized closely and the decision carefully weighed, but when arrived at, the applicable principle applies alike in all similar cases.

Believing myself bound by the decision of the Supreme Court in the cases of *Reid* v. *Covert* and *Kinsella* v. *Krueger,* I will grant the writ prayed for and discharge Joanna S. Dial from custody.

BEN MOORE,
United States District Judge.

SEPTEMBER 6, 1958.

Habeas Corpus No. 2145

UNITED STATES OF AMERICA ON THE RELATION OF ALBERTA SINGLETON, PETITIONER

v.

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, RESPONDENT

This matter having been regularly brought on the 5th day of September, 1958, for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been thereon had, it is by the Court ordered that the said Mrs. Joanna S. Dial in whose behalf the Writ of Habeas Corpus was sued out, is illegally restrained of her liberty, as alleged in the petition herein, and that she be and she is hereby discharged from the custody of Nina Kinsella, Warden of the Federal Reformatory for Women, at Alderson, West Virginia, from whom she has been produced.

Enter: Sept. 8, 1958.

BEN MOORE,
United States District Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1958